

1. In addition to the record cited by the SALJ, the record also includes the transcript of the February 11, 2009, regular hearing and exhibit thereto; the transcript of the March 5, 2009, deposition of Dr. Pedro A. Murati and exhibits thereto; the transcript of the March 11, 2009, deposition of Jerry D. Hardin and exhibits thereto; the transcript of the April 6, 2009, deposition of Mike Marks and exhibit thereto; the transcript of the April 10, 2009, deposition of Dan R. Zumalt and exhibits thereto; and the parties' March 6, 2009, stipulations to the medical records of Tanglewood Medical Center/Dr. Panakos from November 6, 2006, through July 2, 2007, and Cohoon Chiropractic from August 28, 2003, through June 3, 2004.

2. The record does not include Dr. Paul S. Stein's medical records.

3. Claimant's date of accident is May 9, 2007.

4. At the time the parties entered into the Agreed Award, the ALJ found claimant sustained a 26.5% task loss using the task list prepared by Mr. Zumalt and applying Dr. Stein's restrictions, a 41% task loss using the task list prepared by Mr. Hardin and applying Dr. Stein's restrictions and a 45% task loss using the task list prepared by Mr. Hardin and applying Dr. Murati's restrictions. The parties indicated there was no agreement or stipulation as to claimant's task loss at the time of the Agreed Award.

5. At the time of the Agreed Award, claimant was not working. If the Agreed Award had not been entered into by the parties, an ALJ could have found claimant sustained a 100% wage loss and a task loss of 26.5%, 41% or 45%. If claimant was found to have a 100% wage loss and a 26.5% task loss, claimant would have a work disability of 63.25%, which would have resulted in an award of disability benefits capped at \$100,000 pursuant to K.S.A. 44-510f.

6. Respondent conceded it is uncontroverted that since claimant's original accident and after the Agreed Award was entered: claimant underwent a second back surgery, Dr. Murati opined claimant's functional impairment has increased by 2% and his restrictions have increased and claimant has an increase in task loss.

7. If claimant is entitled to a modification of his award, the effective date of the modification of claimant's Agreed Award is November 23, 2010.

ISSUES

This claim was settled by Agreed Award on April 29, 2009, for \$50,000 in permanent partial disability benefits,¹ plus \$17,315.55 in temporary total disability benefits. The rights to seek future medical benefits and review and modification were left open.

On May 23, 2011, claimant filed an Application for Review and Modification, alleging that his physical condition had changed. SALJ Shelor found claimant was entitled to modification of his award effective May 23, 2011. The SALJ stated:

The [review and modification] statute requires a change in the Claimant's condition before modification of the underlying award is possible. That has occurred as Claimant was assigned an additional 2% permanent partial general body functional impairment and Claimant has a 73% task loss as opined by Dr. Murati. Claimant

¹ Although the Agreed Award contains findings of a 100% wage loss and task loss percentages of 26.5%, 41% and 45%, the award of \$50,000 in permanent partial disability benefits was based upon a 26.26% "permanent partial general bodily disability." Agreed Award at 3.

now has [an] 86.5% work disability. Additional restrictions were also opined by Dr. Murati. [Citation omitted.] The burden of establishing a change in conditions is on the party seeking modification.

. . .

As a result of Mr. Culver's present condition, he remains entitled to a capped Award. He is not working at this time, and has a 100% wage loss. Claimant's current work disability allows him a total award of \$100,000.00. Claimant is entitled to additional compensation from the date of May 23, 2011 when the review and modification was filed by the Claimant.²

Respondent maintains claimant is not entitled to review and modification of his award. Respondent submits claimant was entitled to a \$100,000 award in 2009, when the parties entered into the Agreed Award, and he remains entitled to an award of \$100,000 at the present. Therefore, regardless of his increased functional impairment and task loss, claimant has not experienced a change of condition or circumstances and he is not entitled to modification of his award.

Claimant contends the SALJ was correct in modifying claimant's Agreed Award.

The issue before the Board on this appeal is: was there a change in claimant's condition, thus entitling him to a modification of his prior award?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant's Application for Hearing alleged low back and right leg injuries resulting from drilling and twisting May 4 through 9, 2007. On April 29, 2009, the parties entered into an Agreed Award. The parties agreed claimant sustained a personal injury by accident arising out of and in the course of his employment on May 4, 2007, and every working day thereafter. The Agreed Award indicated future medical benefits and review and modification would be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

In the Agreed Award, the parties stipulated claimant sustained a 26.26% permanent partial general body disability. The parties stipulated claimant's average weekly wage was \$870.59, plus fringe benefits. The Agreed Award then awarded claimant 35.86 weeks of

² SALJ Award at 5.

temporary total disability benefits at the rate of \$483 per week, or \$17,315.55,³ followed by 103.52 weeks of permanent partial disability benefits at the rate of \$483 per week, or \$50,000, for a total award of \$67,315.55. The sum of \$49,676.55 was due in a lump sum, less amounts previously paid, with the rest due at the rate of \$483 per week. Claimant has been paid the entire \$67,315.55 that was awarded.

Claimant filed an Application for Review and Modification on May 23, 2011, alleging his physical condition had changed since he settled his claim. Claimant testified he underwent back surgery, which he thought took place in April 2011, by Dr. Grundmeyer. The surgery was claimant's second back surgery since his 2007 accident. He testified he worked for Aerospace Turbine Rotables (Aerospace) from August 18, 2010, through May 28, 2011, making \$10 per hour and working 40 hours per week, but May 28 was the only day he worked in May 2011. Claimant indicated after the second back surgery, he received different restrictions and Aerospace would not allow him to return to work.

On February 20, 2013, at the request of his attorney, claimant was evaluated by Dr. Pedro A. Murati. The doctor previously evaluated claimant in 2008 and was the only physician to evaluate claimant and testify since the Agreed Award. Dr. Murati opined, using the *Guides*,⁴ claimant has an additional 2% whole person functional impairment for his second back surgery, which the doctor indicated occurred on November 8, 2011. The doctor also assigned claimant more restrictive restrictions. Dr. Murati circled tasks claimant could no longer perform in a task loss analysis report prepared by vocational consultant Jerry D. Hardin and indicated he agreed with Mr. Hardin's analysis. Mr. Hardin indicated the non-duplicative job tasks circled by Dr. Murati calculated to a 73% task loss.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁶

K.S.A. 44-528 states:

³ Although the parties stipulated to \$17,315.55, it appears to be in error, as 35.86 weeks at \$483 per week is \$17,320.38.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁵ K.S.A. 2006 Supp. 44-501(a).

⁶ K.S.A. 2006 Supp. 44-508(g).

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

K.S.A. 44-510f(a) provides:

Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

Respondent concedes it is uncontroverted that since the date of the Agreed Award, claimant has undergone surgery, has a 2% increase in functional impairment, more restrictions and a higher task loss. Respondent asserts that at the time of the Agreed Award, claimant could have received an award capped at \$100,000 had he gone forward with his claim, but chose to settle for \$50,000. Because claimant was entitled to a \$100,000 “capped” award and is still entitled to a \$100,000 “capped” award, there is no change in claimant’s condition.

Respondent, in its brief and at oral argument, repeatedly contended claimant settled his claim, when in fact, both parties settled this claim. Respondent’s argument that claimant could have received an award capped at \$100,000 had he not agreed to settle for \$50,000 contains several faulty premises and paints an incomplete picture of the Agreed Award. Respondent asserts that if this matter went to hearing, claimant, without question, would have received a \$100,000 award. Respondent’s argument presumes claimant settled for \$50,000 in permanent partial disability benefits and claimant is limited to that amount unless he sought a review and modification alleging he was permanently and totally disabled. However, the Agreed Award left open all issues, therefore allowing claimant to seek a review and modification of his claim, including additional permanent partial disability benefits.

In *Ramey*,⁷ the Kansas Court of Appeals addressed this very issue. Ramey sustained a work injury in 2005 and underwent neck surgery in 2006. Ramey reached maximum medical recovery and was given a 10% whole person functional impairment. The parties settled the claim for \$19,380.50 based upon the 10% whole person functional impairment and Ramey retained the right to apply for review and modification. Ramey returned to his job at Cessna and worked for 2½ years, without restrictions, until he was laid off. Ramey then saw Dr. Murati, who assigned Ramey a 25% whole person functional impairment and recommended numerous restrictions. Ramey then applied for a review and modification.

⁷ *Ramey v. Cessna Aircraft Co.*, No. 104,819, 2011 WL 4035762 (Kansas Court of Appeals unpublished opinion filed Sept. 9, 2011).

The ALJ found Ramey had a 100% wage loss and no physician gave an opinion on task loss. Therefore, Ramey sustained a 50% permanent partial disability resulting in a \$100,000 award. The Board affirmed the finding that Ramey was entitled to an increased award, but modified the calculation to a 67% permanent partial disability. The Kansas Court of Appeals affirmed the Board's Order, stating:

Finally, the purpose of a modification proceeding is to determine if the claimant's disability has changed. *Gile v. Associated Co.*, 223 Kan. 739, 741, 576 P.2d 663 (1978). Ramey filed an application for modification due to a "worsening of [his] condition." To decide whether modification was appropriate, K.S.A. 44-528(a) instructs the ALJ to look at whether the functional impairment or work disability of the employee has increased or diminished. To make that determination in this case, the ALJ must look to the definition of permanent partial disability contained at K.S.A. 44-510e(a) to calculate the extent of disability, if any. "A work-disability award is based on the average of two percentages: (a) the percentage to which the employee has lost the ability to perform the work tasks performed 'in any substantial gainful employment' in the 15 years before the accident and (b) the percentage loss in the employee's average weekly wage." *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 262, 211 P.3d 175 (2009); see K.S.A. 44-510e(a).

This approach has been consistently supported by our court in the context of modifications under K.S.A. 44-528. See, e.g., *Scheidt*, 42 Kan. App. 2d at 262; *Edwards v. Boeing Co.*, 37 Kan. App. 2d 469, 474, 154 P.3d 532, *rev. denied* 284 Kan. 945 (2007); *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 199, 83 P.3d 1239 (2002). The fact that it is a modification of an award does not alter the test for determining permanent partial disability. *Asay v. American Drywall*, 11 Kan. App. 2d 122, 124-25, 715 P.2d 421, *aff'd* 240 Kan. 52, 726 P.2d 1332 (1986).

Correctly applying the formula, the Board found that a modification would be appropriate. Cessna does not challenge the calculation made in this case under K.S.A. 44-510e(a), nor does it argue that there was insufficient evidence to support the ALJ or the Board's conclusions as to the amount of the award. Instead, it rests its argument on the interpretation of K.S.A. 44-528(b).

In the present claim and *Ramey*, the parties settled the claims in a running award, subject to review and modification, based upon a functional impairment. After settling the claims, Ramey and claimant's functional impairments increased and they sustained wage losses. The Board is hard-pressed to distinguish the facts in *Ramey* from the facts in this claim, and thus vacate the precedent set in *Ramey*.

Simply put, respondent's argument ignores the plain and clear language of K.S.A. 44-528(a) that where "the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award." While respondent's argument is novel, it is uncontroverted claimant's functional impairment and

work disability increased since the Agreed Award. Accordingly, the Board finds the SALJ was correct in modifying the Agreed Award.

CONCLUSION

After the parties entered into the April 29, 2009, Agreed Award, claimant's functional impairment and work disability increased and, therefore, the SALJ had the authority to grant claimant's request for modification.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 21, 2013, Review and Modification of an Award entered by SALJ Shelor by finding:

1. Claimant's date of accident is May 9, 2007.
2. The effective date of the modification of the Agreed Award is November 23, 2010.
3. In the Agreed Award, the ALJ found claimant was entitled to 35.86 weeks of temporary total disability benefits at the rate of \$483 per week, or \$17,315.55, followed by 103.52 weeks of permanent partial disability benefits at the rate of \$483 per week, or \$50,000, for a 26.26% permanent partial general body disability and a total award of \$67,315.55, with \$49,676.55 due in a lump sum, less amounts previously paid, and the rest, \$17,639, due at the rate of \$483 per week. The Board calculates the \$17,639 due and owing claimant would pay out over 36.52 weeks ($\$17,639 \div \$483 = 36.52$). The \$67,315.55 awarded in the Agreed Award would have been paid out in January 2010.
4. From November 23, 2010, through May 28, 2011, claimant was employed at Aerospace Turbine Rotables. Claimant testified he made \$10 per hour working 40 hours per week, for an average weekly wage of \$400. The parties stipulated claimant was making \$870.59 per week plus fringe benefits at the time of his accident, but no evidence was presented concerning claimant's fringe benefits. The Board finds that from November 23, 2010, through May 28, 2011, a period of 26.71 weeks, claimant had a wage loss of 54% and a task loss of 73% for a work disability of 63.5%. For that period of time,

⁸ K.S.A. 2013 Supp. 44-555c(j).

claimant is entitled to 26.71 weeks of permanent partial disability benefits at the rate of \$483 per week, or \$12,900.93.

5. Beginning May 29, 2011, claimant became unemployed and had a 100% wage loss and a 73% task loss for an 86.5% work disability. Commencing May 29, 2011, claimant would be entitled to 40.96 weeks of permanent partial disability benefits at the rate of \$483 per week, or \$19,783.52. Thus, claimant is entitled to a total award of \$100,000, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Review and Modification of an Award and the Agreed Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Jerry Shelor, Special Administrative Law Judge

Honorable Gary K. Jones, Administrative Law Judge